

July 28, 2014

Ariel Pierre Calonne
City Attorney
Post Office Box 1990
Santa Barbara, CA 93101

Re: Your Request for Informal Advice
Our File No. A-14-073

Dear Mr. Calonne:

This letter responds to your request for advice on behalf of Santa Barbara City Council Member Harwood “Bendy” White, regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090.¹ Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Act or Section 1090. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are accurate. If this is not the case, then our advice could be different.

In regards to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and the Santa Barbara County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that the following advice is not admissible in a criminal proceeding brought under Section 1090 against any individual other than the requestor. (See Section 1097.1(c)(5).)

QUESTIONS

1. Do the Act’s conflict of interest provisions prohibit Council Member White from making, participating in making, or using his official position to influence the City of Santa

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

Barbara's decision on whether to enter into a contract to make desalinated water available for a fee to the Montecito Water District?

2. Do the provisions of Section 1090 prohibit Council Member White from participating in making the contract with the Montecito Water District or otherwise prohibit the City of Santa Barbara City from making the contract?

CONCLUSIONS

1. No. Under the facts presented, at this point we do not believe it is reasonably foreseeable that the City of Santa Barbara's decision on whether to enter into a contract to make desalinated water available to the Montecito Water District for a fee would have any measureable effect on Council Member White's financial interests. Therefore, Council Member White would not have a conflict of interest under the Act in making, participating in making, or using his official position to influence the City's decision.

2. No. Under the unique facts presented, Council Member White is not "financially interested" in the contract for purposes of Section 1090, and neither he nor the city council would violate Section 1090 by making the contract.

FACTS

Your original request for advice contained the following facts. The City of Santa Barbara (the "City") is considering whether to enter into a contract of some form to make desalinated water available for a fee to the Montecito Water District (the "Water District"), the boundaries of which lie entirely outside the City. Council Member White owns three distinct parcels of residential real property, two in unincorporated Summerland and one in unincorporated Montecito, and is a customer of the Water District at each of those parcels. Each parcel is worth well in excess of \$2,000. The Water District, not the City, is responsible for setting the rates and charges for water service at each of Council Member White's properties and Council Member White pays the water charges directly. The Water District is located in the southern coastal portion of Santa Barbara County and includes the unincorporated communities of Montecito and Summerland. It has a population of approximately 13,100 and currently provides water to approximately 4,500 customers.

In subsequent e-mails, you have provided the following additional information. Council Member White rents to tenants, for substantial amounts, the three residential properties that receive water from the Water District, but you are aware of no facts in which the City's decision to make or not make the contract would have a material financial effect either on Council Member White's business of renting these properties (Regulation 18705.1) or on the tenants who are sources of income to him (Regulation 18705.3). On the issue of whether the contract will result in water rate increases for the properties and thus have a potential personal financial effect on Council Member White, there is no information on the costs or rate impacts, if any, associated

with the contract. Those decisions will be made at a later date by the Water District. Finally, you are not aware of any information that could lead to a conclusion that the City's decision to make or not make the contract would curtail or increase construction in the Water District or otherwise have an effect on the value of properties in the Water District. It also appears, at this point, that if the City decides to make its desalination plant operative it will take a significant amount of time, up to several years, to do so.

ANALYSIS

I. Conflicts of Interest under the Act

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has a financial interest specified in Section 87103. A public official has a "financial interest" in a government decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a conflict of interest under Section 87100.

Step One - Is the individual a public official? (Section 87100; Regulation 18700(b)(1).)

As a member of the city council of the City, Council Member White is a public official for purposes of Section 87100. (Sections 82003, 82041 and 82048(a).)

Step Two - Will the public official be making, participating in making, or using his or her official position to attempt to influence a government decision? (Section 87100; Regulation 18700(b)(2).)

As stated above, a public official is subject to Section 87100 if he or she makes, participates in making, or uses his or her official position to attempt to influence a government decision.

Under Regulation 18702.1, an official "makes" a government decision when he or she, among other things, votes on a matter, enters into a contract on behalf of his or her agency, or obligates or commits his or her agency to any course of action. (Regulation 18702.1(a).) Under Regulation 18702.2, an official "participates" in a government decision when, generally, he or she negotiates, without significant substantive review, regarding a government decision, or advises or makes recommendations to the decisionmaker directly or without significant substantive review. (Regulation 18702.1(a) and (b).) Under Regulation 18702.3, an official "uses his or her official position to influence" a government decision when he or she contacts, appears before or otherwise attempts to influence a member, officer, employee or consultant of the official's own agency or, when appearing before another government agency, the official acts or purports to act on behalf of his or her own agency. (Regulation 18702.3(a) and (b).)

Therefore, if, in his capacity as city councilmember, Council Member White takes any of the actions described above in relation to the City's consideration of the contract with the Water District, he will be making, participating in making, or using his official position to influence a government decision for purposes of Section 87100.

Step Three – Identify the public official's interests that may be affected by the government decision. (Sections 87100 and 87103; Regulation 18700(b)(3).)

Section 87103 and Regulations 18703 through 18703.5 set forth the types of financial interests held by a public official that, when affected by a government decision, may expose the official to a possible conflict of interest. Under the Act, Council Member White has several interests that might qualify as interests as contemplated by Section 87103.

- An investment interest in a business entity (presumably worth \$2,000 or more) based on his business of renting the three residential properties that are serviced by the Water District, and an interest in that business entity because of his position of management as the owner of this business. (Section 87103(a) and (d) and Regulation 18703.1.)
- An interest in real property (presumably worth \$2,000 or more) based on his ownership of the three residential properties serviced by the Water District. (Section 87103(b) and Regulation 18703.2.)
- An interest in a source of income (presumably of \$500 or more during the 12-month period prior to the city council's decision on the contract with the Water District) for each tenant of his three residential properties serviced by the District. (Section 87103(c) and Regulation 18703.3.)
- A personal financial interest, that is, an effect on his personal expenses, income, assets or liabilities, because of possible water rate increases on his three residential properties serviced by the Water District. (Section 87103 (first paragraph) and Regulation 18703.5.)

However, Section 82034 defines an "investment" in a business entity as limited to business entities that have an interest in real property in the jurisdiction, or does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior to the time any statement or other action is required under this title. . . ." For a local government agency such as the City, "jurisdiction" is defined in Section 82035 as "the region, county, city, district or other geographical area in which it has jurisdiction. Because Council Member White's rental business is limited to properties outside the jurisdiction, he does not have a financial interest in his rental business for purposes of our conflicts analysis.

Similarly, a real property interest is limited to that property within the jurisdiction. Within the jurisdiction, with respect to a local government agency, means located within or not

more than two miles outside the boundaries of the jurisdiction or within two miles of any land owned or used by the local government agency.” Because the properties are located more than two miles from the boundaries of the City, Council Member White does not have an interest in real property for purposes of our analysis.

Finally, Section 82030 defines income to expressly exclude: “income received from any source outside the jurisdiction and not doing business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under this title.” You have not provided any information to indicate that any of Council Member White’s sources of income are doing business within the jurisdiction. Accordingly, for purposes of our analysis we will assume they are not, and these interests will not be analyzed further.

Because Council Member White’s business and, presumably, his sources of income, are not doing business in the jurisdiction, and his real property is not located in the jurisdiction, he does not have a financial interest in a business entity, source of income or real property as contemplated by the Act.

However, a public official always has an interest in his or her personal finances. A governmental decision will have an effect on this interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.) Therefore, our analysis is based solely on whether, under the facts presented, there will be a reasonably foreseeable material financial effect on Councilmember White’s personal finances as a result of the described governmental decision.

Steps Four, Five and Six – Is it reasonably foreseeable that the decision will have a material financial effect on the public official’s interest.

Under Regulation 18705.5(a), the government decision is deemed to have a “material” financial effect on the official’s personal finances if the decision increases or decreases the official’s personal expenses, income, assets or liabilities by \$250 or more in any 12-month period. (Also see Regulation 18703.5.) Thus, if it is “reasonably foreseeable” that the decision on the contract between the City and Water District will increase or avoid an increase on water rates charged to Council Member White, or have some other positive or negative personal financial impact on him, totaling to \$250 or more in any 12-month period, he will have a conflict of interest under the Act.

Newly amended Regulation 18706 sets forth the criteria for determining whether the effect of a government decision is reasonably foreseeable and offers several factors that can be considered in making the “reasonably foreseeable” determination. These include the following:

- The extent to which the occurrence of the material financial effect is contingent upon intervening events, not including future governmental decisions by the official’s agency,

or any other agency appointed by or subject to the budgetary control of the official's agency. (Regulation 18706(b)(1).)

- Whether the public official should anticipate a financial effect on his or her economic interest as a potential outcome under normal circumstances when using appropriate due diligence and care. (Regulation 18706(b)(2).)
- Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's economic interest could compromise the public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public. (Regulation 18706(b)(4).)
- Whether the public official has the type of economic interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest in formulating a position. (Regulation 18706(b)(6).)

You state that you are aware of no facts at this time indicating that the City's decision to make or not make the contract would have any actual or perceived financial effect on Council Member White. In addition, even if the City considers whether to make the contract with the Water District, there will be a significant amount of time before the desalination plant will be operative, and what the circumstances may be after the passage of this time makes any potential determination extremely speculative.

It also appears that any possible effect on the official's personal finances would be contingent upon potential future governmental decisions by the Water District, and perhaps in conjunction with the City.² But the contract at issue under the facts presented does not appear to have any direct impact on the rates to be charged by the Water District. Moreover, nothing in the facts presented lead us to believe that the official's financial interest could compromise his ability to act in a manner consistent with his or her duty to act in the best interests of the public, nor does it appear that his interest would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her financial interest in formulating a position.

Based on these facts and the test set forth in Regulation 18706(b), we do not believe it is "reasonably foreseeable" at this time that the City's decision on whether to make the contract with the Water District will have any measureable effect at all on the personal finances of Council Member White. A host of possible intervening factors, such as fluctuations in the weather, implementation of water conservation measures by the Water District, future decisions by the Water District and/or the City, and the percentage of the Water District's water supply that the City's desalinated water will constitute, makes this determination too speculative at this point. Accordingly, Council Member White would not have a conflict of interest in this decision under the Act.

² If and when the City is faced with such future decisions, we recommend you write in for further advice.

Steps Seven and Eight -- “Public Generally” and “Legally Required Participation” (Regulation 18700(b)(7) and (8)).

These last two parts of the conflict of interest analysis under the Act are essentially exceptions that would be analyzed if facts come to light prior to the City’s decision and it is determined that Council Member White has a conflict of interest. Since that is not the case at this time, we do not provide an analysis of whether these exceptions would apply.

II. Application of Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Typically, we employ the following six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090:

Step One: Is the official subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” Councilmembers of the City are plainly covered by this prohibition. (See, e.g., *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.)

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001);³ 78 Ops.Cal.Atty.Gen. 230, 234

³ It is noteworthy to point out that opinions issued by the Attorney General’s Office are entitled to considerable weight (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17), especially where, as here, it has regularly provided advice concerning a particular area of law. (*Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 662; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.)

(1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) There is no question that the proposed agreement by which the City would sell water to the Water District is a contract for purposes of Section 1090. (*People v. Honig, supra*, at p. 351.)

Step Three: Is the official making or participating in making a contract?

Section 1090 applies to officials who participate in any way in the making of the contract, including involvement in matters such as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft, supra* at p. 569.) Notably, in relation to a public body such as a city council, when members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call, supra* at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of DelNorte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).)

Thus, if any councilmember, including Council Member White, is financially interested in a contract before the city council, unless an exception applies (see “noninterest” exceptions (Section 1091.5) and “remote interest” exceptions (Section 1091)), the entire city council is prohibited from voting or participating in any way in making the contract even if a member who is financially interested disqualifies him- or herself from the process.

Step Four: Does the official have a financial interest in the contract?

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest” (*People v. Honig, supra*, at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallergera* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

More recently, in *Eden Township Healthcare Dist. v. Sutter Heath* (2011) 202 Cal.App.4th 208, the court of appeal held that “to be prohibited under section 1090, the public official's financial interest must be related to the contract. . . . The purpose of the prohibition is to prevent a situation where a public official would stand to gain or lose something *with respect to the making of a contract* over which in his official capacity he could exercise some influence.” (*Id.* at p. 225 (emphasis in original; internal citation and quotations omitted).) In analyzing the

“financial interest” element of Section 1090, the court noted that in prior cases where a prohibited conflict was found, “the party who was found to have had a prohibited financial interest received a tangible benefit that arose out of the contract at issue.” (*Id.* at 226.) Importantly, the court held that “if the contract itself offers no benefit to the official, either directly or indirectly, then the official is not financially interested in the contract. . . .” (*Id.* at 228.)

In the instant matter, our analysis above concerning the foreseeability of any financial effect on Council Member White under the Act resulting from the contract illustrates that there is no more than a speculative, minimal connection between the contract and any possible financial effect on Council Member White. The contract itself does not purport to impact the water rates to be charged by the Water District that services the Council Member’s properties and future adjustment to the water rates would have to be made by the Water District and is not part of the contract at issue. Moreover, we do not think Section 1090 was intended to address the indirect, speculative effects of a contract on matters outside the general subject matter of the contract, such as possible impacts on property values or rental of property. On this basis, we find that Council Member is not “financially interested” in the contract and neither he nor the city council would violate Section 1090 by making the contract. Therefore, we need not go through the final steps of the analysis.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

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By: Scott Hallabrin
Counsel, Legal Division

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cc.: Council Member Harwood “Bendy” White
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